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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

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COURT OF CRIMINAL APPEALS
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PD-0936-20_

Jerel Chinedu Igboji, Appellee/Respondent

vs.

STATE OF TEXAS
Petitioner/Appellant.

On discretionary review from the Court of Appeals at Houston on appeal from the 240th D.C. of Fort Bend, Hon. Frank Fraley presiding

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BRIEF OF RESPONDENT

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument in this cause. See Tex. R. App. Proc. 39.7. The Court has indicated it will grant oral argument on the questions identified.

IDENTITY OF PARTIES AND COUNSEL

The Respondent agrees with the list of parties provided by the State Prosecuting Attorney except for the new appellate defense counsel, Patrick F. McCann, as on cover

TABLE OF CONTENTS

INDEX of AUTHORITIES

Introduction and summary of the facts

Once again the State of Texas, this time in the persona of the State Prosecuting Attorney, rides boldly forth to save an illegal seizure by law enforcement, and to save law enforcement personnel from the deadly danger of, ..well, typing.

To begin, it is important to review some basic terms involved in this case. Webster's defines the word "exigent" as requiring immediate aid or action. It then actually uses an example of "exigent circumstances". While a time limit is not provided, nowhere does Webster's, or anyone else outside of the State, suggest that the word immediate means three days or more.

Second, the State has conjured up a legal chimera here in its questions for review. This was never about the Court of Appeals analysis or the panel adding requirements of direct action or dissipation; those are the creation of the state's imagination. The panel simply looked at the case law versus the facts testified to by the Detective Ramirez and could find no exigent circumstances whatsoever. The State simply does not wish to admit that the Detective was wrong in his actions. That is what this case is about, and the answers to the State's questions for review are going to be sadly disappointing as they have no basis in reality.

Last, the Supreme Court has already noted the difference in modern times of what a cell phone truly is. In Section B III of the opinion by Chief Justice Roberts in *Riley v. California*, 573 U.S. 373 (2014), the Court stated : "

But while Robinson's categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, Robinson concluded that the two risks identified in Chimel—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, Robinson regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in Robinson.

We therefore decline to extend Robinson to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search."

The seizure of such a phone must likewise, if not incident to an arrest, be subject to a warrant requirement, despite the State's creative attempt to fit it into a three or four day "exigent circumstances" requirement. What happened here, as is shown in the COA opinion and at Volume III, page 29-32 of the Reporter's Record, is that Stafford Police Detective Michael Ramireez, following up on the robbery by two masked individuals of a local Kentucky Fried Chicken Restaurant on the 10th of December, visited the location and got an indication from the manager that she thought Mr. Igboji behaved oddly the night of the robbery because he volunteered to take some trash out.

Despite having some other potential suspects including a car that matched the description of the vehicle driven by the robbers, he focused in on Mr. Igboji, an African American employee of the restaurant. He researched social media via another employee who was also a witness, and thought that there might be a video of the scene on Mr. Igboji's. The young woman who showed this to him declined to sign an affidavit or forward the video to him, so Ramirez decided to seek it from Mr. Igboji

himself. He called Mr. Igboji to come down to the station. Mr. Igboji did so, after being picked up by the Detective, and Detective Ramirez took his phone. Detective Ramirez made it clear Mr. Igboji did not consent. This was on the 14th. So, THEN the detective sought a warrant to search the contents. [RR III, P. 29-32, 40-50]

In essence, the Detective stole Mr. Igboji's property, no differently than if he had lifted his wallet. His phone contained a great deal of personal information, and later Detective Ramirez tried to justify it by getting a warrant to search the contents to use them to arrest him. That is what happened here. Now, having established that, it is important to examine the myriad ways in which the State was wrong in this case on the way it views the Fourth Amendment.

ARGUMENT

1. There is almost always time to get a warrant

   Broadly speaking, as *Riley v. California* states clearly, and as the Fourth Amendment has been held to mean, the Constitution demands that police get a warrant. See *Riley v. California*, 573 U.S. 373, at 376-77, IV Amendment.

   a. There was certainly time to get a warrant here

      A charitable view of the officer's own testimony shows over three days elapsed before he had Mr. Igboji came to the police station. It appears closer to five and certainly four by the time the officer actually got the

warrant and searched the contents of the phone. [RR III, p.29-32, 35] This is Houston, the largest metropolis in Texas. Stafford is a major suburb in a county with a population approaching 800,000. There are no shortages of magistrates eager to help law enforcement when presented with a proper affidavit supporting probable cause.

b. The unanswered question is "Why didn't the officer get a warrant?" This is a conundrum. If the officer had time and enough sense to get a warrant for the contents, why then did he not exhibit the same good judgment for the seizure of the phone itself, instead of simply stealing it as he did? Perhaps, in a fashion similar to how he misunderstood how Snapchat works, the officer simply misunderstood how the Fourth Amendment works. Clearly from his own testimony at the motion to suppress the Detective did not believe he had obtained consent, another exception to the warrant requirement. Now, by his own admission he did not pursue this line of questioning for long; he simply abandoned it and took the phone. The State, at page 36-37 of its brief, lingers over what it theorizes a "reasonable" officer could have done in these circumstances. None of that mental meandering matters because the Detective *did not do those things, proving once again that he was not acting reasonably.* It is per se unreasonable when a suspect is already in one's sights [which thanks to the reluctant co-worker Mr. Igboji already was]

to simply take from them items one feels like grabbing when a judge is but a phone call away.

If one runs down the mental checklist for such exceptions taught to police academy graduates, they were not in a situation where they had arrested Mr. Igboji for anything, and so could not use that as an excuse. [The State continues to misunderstand *Riley* in this way; In *Riley* v. *California* and its companion case the persons were under arrest, and the phones were seized incident to arrest, a common and respected exception to the general warrant requirement] *Riley*, id. In fact they could not possibly have obtained a warrant for such an arrest at that point as they had absolutely zero evidence to connect him to the robbery or to the people who conducted it, other than the opinion of a co-worker that Igboji was acting suspiciously. Apparently the possibility that he was being deliberately diverted to Igboji had not occurred to the Detective.

So, there was no consent, no arrest, and no warrant. They were not at the border nor was Detective Ramirez conducting a border search or a welfare check upon the phone. What are we left with? Why, exigent circumstances, of course!

c. . The likely answer is the officer knew he had no ability to justify his seizure in a PC affidavit

With all due respect to the Detective, he simply stole an item he thought might be helpful to him to develop probable cause to arrest Mr. Igboji. The Supreme Court has spoken eloquently about such actions in *United State v. Jones*, where Justice Scalia chided the police for acting illegally when trying to catch criminals. See *United States v. Jones*, 565 U.S. 400 (2012),.

II. The Supreme Court expects police to get warrants

The Supreme Court has expected warrants from the police for a few hundred years now. See ***Weeks v. United States*, 282 U.S. 383 (1915).**

a. Policy does not favor seizure or else why have the Fourth Amendment at all? The State's view on this in their brief is, well, ..astounding. They have literally turned the Fourth Amendment on its head, and with it every citizen's right to be free from unreasonable search and seizure.

Policy can NEVER favor seizure. If one does that it factually creates a group of people who are now entitled to do illegal acts in pursuit of law enforcement. In this case, a detective can simply take whatever he wishes from a citizen, black, white, brown, yellow or red, anything he wishes to in order to get a warrant later that may or

may not help the officer make a case. If one substitutes "car keys", wallet, or house keys, bank safe deposit keys, safe keys, briefcase, or laptop for the word "cell phone" in this case, one can start to see the enormous change in Fourth Amendment jurisprudence the State advocates. This not what *Riley* stands for, in fact it and *Missouri v. McNeely* stand for just the opposite. In *Missouri v. McNeely*, 569 U.S. 141 (2013) Justice Sotomayor said it best when she wrote about exigent circumstances:

> The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See, e.g., United States v. Robinson, 414 U. S. 218, 224 (1973) . That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." Winston v. Lee, 470 U. S. 753, 760 (1985) ; see also Skinner v. Railway Labor Executives' Assn., 489 U. S. 602, 616 (1989) .
>
> We first considered the Fourth Amendment restrictions on such searches in Schmerber, where, as in this case, a blood sample was drawn from a defendant suspected of driving while under the influence of alcohol. 384 U. S., at 758. Noting that "[s]earch warrants are ordinarily required for searches of dwellings," we reasoned that "absent an emergency, no less could be required where intrusions into the human body are concerned," even when the search was conducted following a lawful arrest. Id., at 770. We explained that the importance of requiring authorization by a " 'neutral and detached magistrate' " before allowing a law enforcement officer to "invade another's body in search of evidence of guilt is indisputable and great." Ibid. (quoting Johnson v. United States, 333 U. S. 10 –14 (1948)).
>
> As noted, the warrant requirement is subject to ex- ceptions. "One well-recognized exception," and the one at issue in this case, "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." Kentucky v. King, 563 U. S. ___, ___ (2011) (slip op., at 6) (internal quotation marks and brackets omitted). A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, Michigan v. Fisher, 558 U. S. 45 –48 (2009) (per curiam), engage in "hot pursuit" of a fleeing suspect, United States v. San- tana, 427 U. S. 38 –43 (1976), or enter a burning building to put out a fire and investigate its cause, Michigan v. Tyler, 436 U. S. 499 –510 (1978). As is relevant here, we have also recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. See Cupp v.

Murphy, 412 U. S. 291, 296 (1973) ; Ker v. California, 374 U. S. 23 –41 (1963) (plurality opinion). While these contexts do not necessarily involve equiva- lent dangers, in each a warrantless search is potentially reasonable because "there is compelling need for official action and no time to secure a warrant." Tyler, 436 U. S., at 509.

The reasoning she expounds upon in this passage is exactly what the panel below followed. It is what should guide this Court. When it is followed, it means the States loses and this petition must be denied. There was, simply put, no burning house here, and no exigent circumstance to be had or created by an imaginative detective.

b. Police do not get to make up their own exigent circumstances

One has to respect the State for the old college try, as they say. Since they could not possibly find a way to justify this conduct under any of the other exceptions to a warrant they make the try at "exigent circumstances". It is a pity that the cases they cite actually make it clear that three or more days delay do not make up exigent circumstances. In each case the State cites in its argument the Supreme Court specifically mentions the number of days as a source of delay created by the officers, hence the "created exigency" issue. In fact, at pages 18 and 19 of the State's brief, the State takes off on a fanciful flight of imposed creativity, substituting what they believe to be the analysis for the very simple actual analysis by the COA panel. Based upon the cases the *Igboji* panel cited, they simply could find ***no***

evidence presented by the officer that justified exigency. They did not "complicate" the analysis; they merely carried it through and found the State's argument woefully lacking. Again, this was creative, but it was not reality. The same is true of the analysis the State attempts to impose on the panel and this Court at page 15 of its brief.

None of the supposed reasoning that the State indulges in is what the panel actually held. See Petitioner's Brief, p. 15, 16, 18-19. The panel did not impose additional standards – they simply could not find any facts to support the exigency the State claimed! That is the problem when one starts from a flawed or dicey premise – it always leads one astray.

c. All courts must act as a check on police misbehavior, from reviewing magistrate to trial court to reviewing appellate court. With due respect to the SPA' brief, all courts from city traffic magistrates to the Supreme Court must "second guess " police every day.

A neutral magistrate, unfamiliar with the police's investigation, must issue a warrant. *See Johnson v. United States*, 333 U.S. 10, 14 (1948). This happens, despite the lamenting of the police union and the prosecution, thousands of times each day across the United States. The requirements for warrants have never stopped police from arresting and prosecuting thousands of citizens every day.

A trial court has discretion to admit or keep out evidence. In particular, the exclusionary rule is designed to deter bad police conduct in refusing to follow the law. The State ponders in its brief what reasonable officer is deterred if this information is suppressed. Respectfully, it will be pretty much every one of them. The State has started from a flawed premise, that a detective who acted illegally is somehow their ideal "reasonable" officer. From that flawed premise they have proceeded down an equally creative analysis to an ultimately wrong conclusion, i.e. that this action of seizing a phone was somehow something this Court should overlook.

Last, a reviewing court reviews mixtures of fact and law de novo, and that is what the COA did here, as they were required not to decide whether the contents were subject to a warrant, but whether the phone should have been seized in the first place!

2. Application

    a. The officer made things difficult by failing to follow the requirement for warrants

The SPA places blame upon the COA panel which heard this case for making things difficult. With all due respect to the State, it is not the COA which made things challenging, but the officer. Detective Ramirez could have asked for consent. He could have questioned

Mr. Igboji more artfully to develop probable cause to get a warrant to seize the phone. He could have subpoenaed the information from the third party co-worker. He could have tried to get phone records to see if the phone itself was used to contact people around the time of the robbery, and followed that lead. He did not do those things – he simply stole it from Mr. Igboji and then was lucky enough to find some video and text that was incriminating on the phone. [By the way, it seems clear that the texts, which Detective Ramirez did not appear to know about, may have been more important to the jury than the scene video]. That is the exact opposite of how the Fourth Amendment is supposed to work.

b. The Court of Appeals tried its best to save him but in the end it could not, whether via alternate sources or any other analysis

The Appellant would respectfully suggest the Court of Appeals went the extra measure on its analysis to try and save the officer from his own reckless action. Its review and suggestions of delay are not a revival of anything; the panel's doctrine is a straightforward application of the same delay cited in the Supreme Court decisions by the State itself as a reason NOT to grant an exigent circumstances exception. See *Igboji* decision below.

The technology argument also does not avail:

The detective said he was concerned that the evidence could disappear if he did not seize the phone. This is the one potential area where he might have actually had a point, if he had not bungled this as well. If, as he initially said, he worried that Snapchat would erase the message in 24 hours, or even sooner at the direction of the sender, then ***why did he wait three days to talk to Mr. Igboji, and another day or two to get the warrant?*** Either he was lying or he did not care, in which case the exigent circumstances exception vanishes along with the State's case. Snapchat does have the ability to delete photos or video uploads. However, the officer already knew of the video's existence due to the discussion with a third party. He could have subpoenaed that if he needed it from that third party. Clearly this "fear" was something he used to retroactively justify an unreasonable action. However, if the technology has today advanced to where some people may be able to remove their information from phones remotely or even the web-based cloud storage***, then a situation could exist in the future where an officer could legitimately claim that his actions were motivated by fear of lost evidence*** or destroyed evidence. While it could be true someday, that is not what happened here. Detective Ramirez exhibited an utter

disregard for the timely pursuit of anything, let alone evidence. He took his time about gathering information, and as the Supreme Court has said, anything past a two day delay is not "exigent". However, the officer's mistake is not the Court's problem, nor should it be. Warrants require care and factual correctness else they are not warrants at all.

c. Wouldn't it be wonderful if we could teach officers to actually follow the law?

The Detective here simply stole a man's cellphone, then used his badge and a follow on warrant to justify it. That is the antithesis of a "reasonable seizure". If the officer had stolen a car or laptop and then later gotten a warrant to obtain incriminating information to make an arrest, then perhaps the conduct's basic illegality might be more clear. This Court should deny the Petition, or in the alternative dismiss it as improvidently granted, and allow the decision of the lower court to stand as this officer violated the Fourth Amendment in his actions.

CONCLUSION

A person, any person, should be free from unreasonable searches and seizures. No policeman is entitled to simply take one's property. In this instance, without an

arrest, consent, or any real exigent circumstances, a warrant was required to take Mr. Igboji's phone. Anything else is a distraction from the simple facts of what actually happened here. So, in response to the State's questions for review, these should be the responses of the Court, respectfully.

1. Do exigent circumstances exist to seize a cellular phone for fear of unintentional loss of evidence require the police to act at the earliest opportunity? No, because no such circumstances existed here.
2. Do exigent circumstances for intentional destruction of evidence require an "affirmative act" by the suspect? Probably, but again, not what happened here. Any exigent circumstances were ignored by the detective in this case and were certainly not the basis for his actions, whatever he claimed or said.
3. Does the exigent circumstances exception require proof that the evidence was unavailable from other sources? This question should never have been granted because it is frankly irrelevant. However, in the spirit of trying to give a fair answer to a fair question, the answer in this instance should be "perhaps." In fairness this case is not the best vehicle for this question. The question itself raise ancillary questions of to whom the burden should be upon if such a proof is required, and by what standard of proof. However, this question honestly cannot be answered by these facts. Nor should it because the true issue here was that there was never any evidence of exigence at all, so using this case to establish such answers would be a

disservice to a proper question. It is simply not the right case for these answers.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant prays accordingly, that this Court should deny the State Prosecuting Attorney's Petition, uphold the lower appellate court's decision, or in the alternative dismiss this as improvidently granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above Respondent's Brief has been served on to the State Prosecuting Attorney's office, , at their place of business in accordance with the Texas Rules of Appellate Procedure on this the day of filing, and via electronic means. _/s/ Patrick F. McCann___, Counsel

CERTIFICATE OF COMPLIANCE

I hereby affirm in accordance with the Texas Rules of Appellate Procedure that this

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